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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1032

TOWN OF FRANKLIN, ANTHONY CARBONI, TOWN OF SALEM AND ELMER P. CHAPPELL (together with all other duly constituted towns of the State of Connecticut for which permission to intervene was requested, and their respective First Selectmen),

Appellants

vs.

OLIVER BUTTERWORTH, MIRIAM BUTTERWORTH, S. RAINS WALLACE, ROBERT BEACH, CHARLES JACOBSON, DAVID S. MACLAY, BRADLEY MOREHOUSE, JOHN NORMAN, GEORGE LUCAS AND ALBERT E. HOLLAND,

Appellees

On Appeal from the United States District Court for the District of Connecticut

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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As permitted by Rule 16 of this Court, appellants submit the following comments in opposition to appellees' motion to affirm:

1. The statement in appellants' Jurisdictional Statement identifying plaintiffs as "ten individuals from six different urban towns" referred to on page 3 of the motion to affirm is a paraphrase of Judge Clark's description of the plaintiffs (in his opinion printed as an Appendix to the decision of the Court below) as "ten voters from six different urban towns of the State, suing for themselves and others similarly situated . . ." See Appendix to Jurisdictional Statement in *Pinney* vs. *Butterworth*, No. 1078, page 24.

2. At page 4 of the motion to affirm appellees state that "the appellants cite neither case nor history, and indeed appellees know of none" on the question whether towns "are the entity represented in the Connecticut House or whether the towns simply constitute election districts." It is submitted that the clear import of the cases and constitutional provisions cited in the Jurisdictional Statement is that towns are not merely election districts and no support can be found for appellees' claim to the contrary. Moreover, there is incontrovertible historical support for the status of appellant towns not only as more than merely election districts but also as real parties in interest with respect to representation in the Connecticut House. As summarized in the Jurisdictional Statement in *Pinney* vs. *Butterworth* (p 7), "Representation of towns as towns in the Connecticut General Assembly dates back to the beginnings of Connecticut history . . ." and it is also pointed out that:

> "If the Judgment of the District Court is upheld by this Court, many towns of Connecticut will, for the first time in their history, be deprived of a resident representative in the General Assembly. The rationale of the Connecticut House of Representatives, which is the representation of towns as towns, regardless of their populations, would thus be abrogated."

In short, appellees can not sustain the proposition that appellant towns are merely election districts and since such proposition is the sole basis for their motion it should be denied.

3. Appellees' contention that the sustaining of appellants' position would mean appellees have no standing and be inconsistent with holdings in "a long line of decisions of this Court" including *Baker* vs. *Carr* is challenged. Appellants do not contend that appellees do not have standing and a holding that appellants have such interest in this case that they are necessary

parties would not be inconsistent with appellees having standing. Appellants' right to be made parties and the standing of appellees are not mutually exclusive. No decision by this Court is inconsistent with appellants' claim and appellants' right to be heard finds support in the many decisions previously cited.

4. Cases cited by appellees holding that municipal corporations have no standing in federal courts to attack state legislation as violative of the Federal Constitution are irrelevant to the issue in the present case. The situation here is entirely different since appellees, not appellants, have invoked the Fourteenth Amendment and the jurisdiction of the federal courts seeking relief which will deprive appellants of rights secured by the Connecticut Constitution. Appellants are not claiming the protection of the Federal Constitution against the State of Connecticut, but rather are invoking the protection of the Due Process Clause of the Fifth Amendment and of provisions of the Federal Rules of Civil Procedure to obtain a right to assert their claims based upon the Connecticut Constitution.

5. Appellees rely on Article I, Section 2 of the Connecticut Constitution as supporting their contention that towns are merely election districts. If such affirmation that political power is inherent in the people does support appellees' argument then the fact that the Federal Constitution clearly is also based on the power of "we the people" [See *McCulloch* vs. *Maryland*, 4 Wheat. 316, 403 (1819), wherein Chief Justice Marshall stated that "the government proceeds directly from the people."] must mean that the States are merely election districts in the federal system with no legal interest in the organization of the United States Senate. As a matter of fact it should be noted that the provisions with respect to the interests of Connecticut towns in their representatives under the Connecticut Constitution is far more explicit than the provision with respect to the interests of the States in the Senate of the

United States. Compare Article III, Section 3 of the Constitution of Connecticut with the Seventeenth Amendment of the Constitution of the United States.

6. Appellees' indication that they would interpose no objection to permitting appellants to file a brief *amicus* in this Court, while appreciated, is not a solution to the issues presented. Permission to file an *amicus* brief is not a legal substitute for the right to participate as a party and it cannot correct the jurisdictional defect of absence of indispensable parties. A court no more can accurately determine what the effect of presence in litigation of additional parties would have been than it can prognosticate the effect of absence of counsel on the trial of a criminal accused. However, it is to be noted that to some extent the Court below relied in reaching its decision on the absence of evidence on certain matters and it judicially noticed certain other matters. Appellants as parties may well have eliminated such void or presented evidence contradicting the conclusions judicially noted. See Findings of Fact, Appendix to Jurisdictional Statement in number 1078, page 91.

7. Appellees' motion does not deal at all with the fact that the motion to intervene here involved claims a right to intervene by individual First Selectmen as representatives of their towns as well as by the towns themselves.

For the reasons set forth in the Jurisdictional Statement and for the foregoing reasons, the appellants submit that the motion to affirm should be denied.

Respectfully submitted,

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TOWN OF FRANKLIN, ET AL.